

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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STEELE-WARRICK,	:	19CV6558 (FB)
PLAINTIFF,	:	
	:	
-AGAINST-	:	United States Courthouse
	:	Brooklyn, New York
	:	
MICROGENICS CORPORATION ET	:	March 24, 2023
AL,	:	3:00 p.m.
	:	
Defendant.	:	
	:	

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TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT  
BEFORE THE HONORABLE FREDERIC BLOCK  
UNITED STATES DISTRICT JUDGE

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1 THE COURTROOM DEPUTY: Civil cause for oral  
2 argument, *Steele-Warrick v. Microgenics Corp., et al.*

3 Counsel, state your appearances.

4 MR. BRINCKERHOFF: Matthew Brinckerhoff from Emery  
5 Celli for the plaintiff.

6 THE COURT: Good afternoon.

7 MS. WANGER: Emily Wanger from Emery Celli for the  
8 plaintiff as well.

9 THE COURT: I'll make a deal with you. I won't yell  
10 at you if you can speak louder also. I will acknowledge the  
11 fact that my voice is not as good as it was when I was a  
12 terrific trial lawyer, and that when you get a little older  
13 that's what happens, and also maybe my hearing is not as good  
14 as it was. Otherwise, I'm perfect. So you can yell at me,  
15 it's perfectly okay. Try to keep your voices up. We have  
16 microphones. Can you hear me okay?

17 So, where to start? Let me start with the overview  
18 that -- and I recognize that I think this is an important case  
19 and it's one that has some conceptual nuggets to it, which you  
20 folks have spent a lot of time analyzing and evaluating. And  
21 you know, I'm really fortunate we have high-skilled and  
22 high-end lawyers dealing with a case of this magnitude which  
23 is, obviously, something that shouldn't go up to the Circuit  
24 Court of Appeals. So it's sort of a weigh station to some  
25 extent. But if there's a non-final order, then I guess it

1 can't go up unless it's a qualified immunity dynamic. Let me  
2 start by asking Mr. Brinckerhoff. I want to make sure I'm,  
3 pronouncing it correctly.

4 MR. BRINCKERHOFF: Brinckerhoff.

5 THE COURT: Brinckerhoff. All right. Why doesn't  
6 *Sandin* (ph) preclude you from having this case dismissed?

7 MR. BRINCKERHOFF: You mean specifically on the  
8 substantive -- I'm sorry, the due process argument?

9 THE COURT: Well, we have the substantive due  
10 process and we have the Eighth Amendment.

11 MR. BRINCKERHOFF: Correct.

12 THE COURT: Let's talk first about the substantive  
13 due process aspect. So there's a lot that's in here about  
14 *Sandin*, okay. And the question is why is it that you don't  
15 think that this is a *Sandin* case?

16 MR. BRINCKERHOFF: Judge, we do not think that  
17 *Sandin* applies for -- well, one primary reason, which is  
18 *Sandin* is about procedural due process protections that are  
19 unique to the prison context, which we're certainly in prison,  
20 of course, and -- but specifically trying to identify the  
21 types of liberty interests that need to have procedural due  
22 process protections. Whereas --

23 THE COURT: Let me ask you this, whether we talk  
24 about it in the context of procedural due process or  
25 substantive due process, we have to determine that there has

1 been a loss of liberty interest.

2           Okay. And, so, what -- if a person is  
3 incarcerated -- I think you have here an interesting mix of  
4 things. And I think you have a conceptual nugget we may to  
5 some extent be dealing with apples and bananas, but we have to  
6 try to articulate it so I can help the Second Circuit out as  
7 best as I can. So you have prison confinement. So whether  
8 it's procedural due process or substantive due process that  
9 we're talking about, we have prison confinement. So I don't  
10 know if in the context of when someone is incarcerated whether  
11 the loss of liberty obviously is automatically entailed. The  
12 person is incarcerated. And it seems that the *Sandin* court is  
13 saying that if somebody is incarcerated, then, you know, if  
14 their loss of liability has to be what *Sandin* is talking  
15 about, right? So you have that. If this person wasn't  
16 incarcerated, it would be different.

17           You take a typical situation with false arrest,  
18 right. If a person is improperly arrested, any loss of  
19 liberty is actionable, right. But that person has yet to have  
20 been found culpable in the first instance and the person is  
21 not in prison. Does it make a difference whether a person is  
22 in prison or not in prison? *Sandin* seems to address  
23 situations where somebody is in prison already and subject to  
24 enhanced punishment having been convicted, having been subject  
25 to the Bureau of Prisons administration of the jails. So to

1 that extent, it seems that *Sandin* does have a parallel here.  
2 Nonetheless, I don't think it applies. I have my own theory  
3 about that, but I want to know what you think.

4 MR. BRINCKERHOFF: Well, I have a theory as well.  
5 Is it okay if I approach and I can -- and maybe you can hear  
6 me better? Is that okay?

7 THE COURT: Come on up. Sure. If you folks want to  
8 come up here, whatever is comfortable for you.

9 MR. BRINCKERHOFF: The theory that I think is  
10 consistent with the cases and the doctrine is, again, I am  
11 just going to revert back to the distinction that I think  
12 actually is material here between procedural and substantive  
13 due process. And I say that because, of course, due process,  
14 as the Court pointed out with liberty and property interests.  
15 And as you're pointing out, the liberty infringements that are  
16 potentially actionable to someone who is not in prison are far  
17 broader. I mean, even stopped for a couple of minutes is a  
18 deprivation of liberty. All kinds of little infringements are  
19 potentially protected by the due process clause to somebody  
20 who is not in prison.

21 So, the way I read *Sandin*, which is unquestionably a  
22 procedural due process case, is it's focused on the types of  
23 procedures that the prison has to give to a prisoner before it  
24 can effectuate a diminution in their liberty interest and  
25 because of the prison context, the bar is quite high. It

1 can't be we're going to deprive you of an extra hour in the  
2 yard today, even though that is a diminution of your liberty  
3 interest, you don't get to have a due process hearing every  
4 time that happens if you're in prison.

5 Now, that I juxtapose with a substantive due process  
6 claim, which is also, of course, well-recognized, not super  
7 common but well-recognized, that tries to get at the random  
8 unauthorized arbitrary infliction of some kind of deprivation  
9 of liberty on anyone that ought to apply and does indeed apply  
10 and --

11 THE COURT: It doesn't matter whether it's in the  
12 prison context or not in the prison context. If the acts of  
13 the government are such that deprive a person of liberty, even  
14 if it's five minutes, it should be actionable if it's  
15 arbitrary.

16 MR. BRINCKERHOFF: If it's arbitrary in the way and  
17 -- I think a fair reading of our Complaint is -- our Complaint  
18 basically alleges with -- and with well more than plausibility  
19 that the drug testing regime that was instituted here was the  
20 functional equivalent of randomly selecting people for  
21 punishment without any basis whatsoever.

22 THE COURT: Yes.

23 MR. BRINCKERHOFF: And I think we would all agree,  
24 and I assume the Court would agree, if they had decided that  
25 they were going to randomly select DIN numbers and punish

1 people just based on whatever the last number was in their DIM  
2 on any given day, one day would be the 8, the next day it  
3 would be the 3s, if the punishment was not the deprivation of  
4 liberty that would normally be protected in the procedural due  
5 process --

6 THE COURT: Go a little slower. When I used to  
7 practice law I used to talk as fast as you, if not faster.  
8 And you can ask the court reporters how I've transitioned now  
9 to talk slower. It requires discipline. It's not easy. You  
10 are a very smart guy and you have a lot of thoughts on your  
11 head and you want to get them out.

12 MR. BRINCKERHOFF: I apologize. I will slow down.

13 But obviously, the fundamental point that I was  
14 trying to make was that in this unique kind of context, which  
15 I put under the umbrella of all substantive due process cases,  
16 but you could make it more narrow and say they're the ones  
17 where something is random and arbitrary is what we allege in  
18 this complaint is at play the restrictions that would apply in  
19 the procedural due process context and are set forth in *Sandin*  
20 and other cases like it do not apply. And they do not apply  
21 because it's truly, I think, unquestionably conscience  
22 shocking to have a --

23 THE COURT: I'm going to interrupt you because  
24 that's what my job description is.

25 MR. BRINCKERHOFF: Of course.

1 THE COURT: So, you have somebody who is  
2 incarcerated and they're now subject to additional punishment.  
3 So to that extent, whether it's procedural or substantive, I  
4 don't think that really should be the dichotomy that we're  
5 talking about by just saying it's procedural compared to  
6 substantive. I think you have to say why there's a  
7 difference.

8 Let me speak to your counterpart.

9 Who is going to be the one who is going to be  
10 courageous enough to answer Judge Block's questions from the  
11 opposition. Any volunteers?

12 MS. DEDUSHI: Sarande Dedushi on behalf of Annucci  
13 and O'Gorman.

14 THE COURT: So do you want to come up here, and  
15 speak louder so I can hear you better.

16 MS. DEDUSHI: Sure.

17 THE COURT: Or do you want to speak from there? Put  
18 the microphone on so I can hear you better.

19 MS. DEDUSHI: Your Honor, I just wanted to make a  
20 distinction between substantive due process and procedural due  
21 process.

22 THE COURT: Speak a little louder so I can hear  
23 every one of your words clearly.

24 MS. DEDUSHI: Your Honor --

25 THE COURT: Come up here. It might be easier. Why

1 don't you do that.

2 MS. DEDUSHI: Sure.

3 THE COURT: Pending before the Second Circuit Court  
4 of Appeals now.

5 I am going to ask you a question, okay?

6 So the Second Circuit recently in the *Herb* case  
7 written by Judge Wesley for unanimous court, right, said that  
8 keeping somebody in prison for an additional year beyond the  
9 time when they should have been released was a substantive due  
10 process violation. They don't mention a word about *Sandin* in  
11 that decision.

12 Do you think that the Second Circuit was wrong?

13 MS. DEDUSHI: Your Honor, first, I would want to  
14 start and say that *Herd* was decided in 2021, which would have  
15 been after the alleged incident in this case and which would  
16 then make Annucci and O'Gorman be, at minimum, entitled to  
17 qualified immunity on --

18 THE COURT: We're not there yet. You're not  
19 answering my first question. How do you distinguish *Herd*?  
20 That's a substantive due process case. The person was in jail  
21 for about a year longer than when he was supposed to be  
22 released, and the Second Circuit said that's a substantive due  
23 process violation.

24 MS. DEDUSHI: I believe that case is  
25 distinguishable, Your Honor, under the grounds that in order

1 to bring a substantive due process claim you actually have --  
2 the Constitutional claim has to be covered by that specific  
3 Constitutional provision. The only two claims that --

4 THE COURT: Loss of liberty, obviously. So the  
5 Second Circuit could not have reached that decision if it did,  
6 at least implicitly, acknowledge that there was a loss of  
7 liberty, right?

8 MS. DEDUSHI: But in that situation, Your Honor, we  
9 are talking about someone who was arguing that they should  
10 have been conditionally released versus in this situation they  
11 are challenging the disciplinary sanctions against them.

12 THE COURT: Let me ask you this question. Let's  
13 assume somebody is on supervised release. They are doing  
14 great. You know, they've been on supervised release for two  
15 to three years and they're working, they're perfect citizens,  
16 but, you know, they're subject to mandatory drug testing. We  
17 do that. Probation does that all the time, right. And lo and  
18 behold, they flunk because of this drug and they're put back  
19 in jail. Would that be a substantive due process violation?

20 MS. DEDUSHI: Your Honor, again, it would -- it --

21 THE COURT: I am not trying to ask you simple  
22 questions, by the way.

23 MS. DEDUSHI: According to Herd, yes, that would be  
24 substantive due process violation.

25 THE COURT: So why is it different than this case

1 here? You have the alleged arbitrary behavior on the part of  
2 the State officials after they knew, or should have known,  
3 that the testing was questionable and apparently accepting the  
4 allegations as true, which we have to for 12(b)(6) purposes,  
5 they sat on their haunches for eight months or nine months or  
6 ten months, and they did nothing. I think that's the essence  
7 of what they're saying here, right? Why would that not be a  
8 substantive due process violation?

9 MS. DEDUSHI: Your Honor, because under the facts  
10 alleged in their Complaint actually, at least specific to  
11 Annucci and O'Gorman, they do allege all of these claims --  
12 they do allege all of these facts where Annucci and O'Gorman  
13 actually took necessary steps as this information was coming  
14 to them. In the beginning, they weren't aware and they had no  
15 reason to believe that the Microgenics machines were not  
16 reliably --

17 THE COURT: I'm going to ask you -- you have to  
18 accept the allegations as true. And the allegations as true  
19 are that they knew about this and they should have done  
20 something about it and they didn't do anything for maybe nine  
21 months or ten months. I think that's the basic allegations,  
22 right? And so accepting that as true, why is this not a  
23 substantive due process violation?

24 MS. DEDUSHI: Your Honor, this is not a substantive  
25 due process violation because they are failing to allege a

1 liberty interest.

2 THE COURT: Well, what was the liberty interest in  
3 Herd?

4 MS. DEDUSHI: The liberty interest in Herd, if my  
5 memory serves me right, was that he already had done all the  
6 good time credits and there was a miscalculation of his --

7 THE COURT: They don't cite *Sandin* at all?

8 MS. DEDUSHI: Well, in this situation we cited  
9 *Sandin* because plaintiffs are challenging the disciplinary  
10 sanctions imposed as a result of these false positives.

11 THE COURT: See, I think we're mixing apples and  
12 bananas here to some extent. I think what you're really  
13 saying is because these people are incarcerated, then it's  
14 okay to have arbitrary behavior on the part of the officials,  
15 they can arbitrarily all they want to unless they're  
16 incarcerated for three years or something.

17 MS. DEDUSHI: No, Your Honor, that is not what I'm  
18 saying. What I'm saying is that they --

19 THE COURT: You think they should act arbitrarily?

20 MS. DEDUSHI: No, Your Honor, that's not --

21 THE COURT: Then why would that not be a substantive  
22 due process violation if they allegedly are acting  
23 arbitrarily?

24 MS. DEDUSHI: Because Your Honor, I don't think  
25 that -- the individuals in this case, I don't think they

1 allege enough facts to show that the Defendant Annucci and  
2 O'Gorman actually acted arbitrarily. That's what I'm getting  
3 at. The allegations in the Complaint actually show otherwise.

4 THE COURT: Do you think there's any culpability on  
5 the part of the State in this particular case because of the  
6 bad drugs?

7 MS. DEDUSHI: Your Honor, it is our position that  
8 the State believes that the Microgenics machines were actually  
9 reliable.

10 THE COURT: But there came a point in time when they  
11 allegedly knew that it was not so. We have reports from the  
12 State officials that tell you that this was not a good drug.  
13 Nothing was done for many, many months after that report was  
14 rendered.

15 MS. DEDUSHI: Your Honor --

16 THE COURT: And you think that's okay?

17 MS. DEDUSHI: Your Honor, I can assure you that the  
18 Complaint also lists all of the different actions that Annucci  
19 and O'Gorman took from January until they eventually ended the  
20 contract with Microgenics. It started in January of 2019. He  
21 received letters --

22 THE COURT: And it may well be that you can win at  
23 trial, but I have to accept the allegations. And the  
24 allegations really, you know -- the inferences that can be  
25 drawn from them and say that they did not act expeditiously

1 once they knew that this drug was not such a good drug.

2 MS. DEDUSHI: Our argument is that to the contrary,  
3 the allegations show otherwise in the Complaint that --

4 THE COURT: That is a factual matter. That's not  
5 for a 12(b)(6) motion.

6 MS. DEDUSHI: Yes, Your Honor, but in order to  
7 sufficiently allege an Eighth Amendment claim, they --

8 THE COURT: We're talking about substantive due  
9 process first. We'll get to the Eighth Amendment next. Okay.  
10 So you know what, the Sixth Circuit, I think, you know, in an  
11 unpublished decision in a case called Thomas versus Russell  
12 way back in 2000, before three distinguished Circuit Court  
13 judges, Judges Merritt, Kennedy and Silar, you know, were  
14 faced with the substantive due process dynamic as well. And  
15 they say this -- which I say it took me as being probably what  
16 we want to talk about.

17 Thomas's claim sounds there's a claim that prison  
18 officials, like in our case, continue to punish him on the  
19 basis of false evidence -- false evidence, the drugs probably  
20 false evidence, right -- as proved by the party admission of  
21 the Ohio Assistant Attorney General. We have that admission  
22 in this case as well by the State. Cast in this form,  
23 Thomas's claim does not fit neatly under Sandin's purview but  
24 rather appears to present a claim of substantive due process  
25 based on an alleged abuse of governmental authority. I mean,

1 the Supreme Court's decision in *County of Sacramento versus*  
2 *Lewis*.

3 So if you have arbitrary acts, and if somebody is  
4 falsely accused or arrested or whatever based upon arbitrary  
5 governmental authority, there's going to be an automatic loss  
6 of liberty. It could be ten minutes. And I think that, to  
7 me, triggers a substantive due process claim, and maybe that's  
8 the distinction between *Sandin* and the procedure of new  
9 process claims and the arbitrary acts of government. Don't  
10 you think that makes sound law? That's what Herd is all  
11 about.

12 I'm trying to explain. I'm not going to hold in  
13 your favor on this, so you're not going to be surprised. But  
14 I wanted you to engage me in this conceptual nugget that has  
15 challenged the Court. Okay. I gave you an opportunity. You  
16 have done your best, but you haven't convinced me.

17 So now let's go on to talk about some other things.  
18 The Eighth Amendment. I'm not so sure now turning to your  
19 adversary and giving you a chance to catch your breath, Mr.  
20 Brinckerhoff. This fits under the Eighth Amendment and I want  
21 to give you an opportunity to tell me why you think it does.  
22 And I think, once again, you know, you look to Herd and Judge  
23 Wesley talks about the Eighth Amendment in that context also.  
24 And I guess he says that this is an Eighth Amendment dynamic.  
25 I should ask your adversary about that. But let me ask you

1 that first why you think this fits under the Eighth Amendment.

2 MR. BRINCKERHOFF: There's a somewhat similar  
3 dichotomy going on with both of our Constitutional claims.  
4 And in the Eighth Amendment context, there are many cases,  
5 obviously, that are conditions of confinement cases under the  
6 Eighth Amendment, and deal with far greater arguable  
7 deprivations than some of the injuries that we're alleging  
8 here. But there's also a separate line of cases that  
9 basically make it clear that if a prison official or -- sorry,  
10 prison executives are engaged in conduct that has no  
11 legitimate penological justification, that whatever that sort  
12 of injury is caused by that can give rise to an Eighth  
13 Amendment claim. It's a separate doctrine and it's the one  
14 that we're invoking here.

15 THE COURT: I think that you really have a better  
16 substantive due process claim than Eighth Amendment claim.  
17 That's how I read this. But even if I were to agree with you,  
18 it seems that you would have a problem with the qualified  
19 immunity dynamic vis-a-vis an Eighth Amendment claim as  
20 compared to possibly the substantive due process claim.

21 MR. BRINCKERHOFF: Can I tell you why I don't think  
22 we do?

23 THE COURT: Go ahead.

24 MR. BRINCKERHOFF: Yes? The penological  
25 justification line of Eighth Amendment cases is -- existed

1 well before any of the facts in this case. It's been clearly  
2 established for decades based on Supreme Court authority and  
3 Second Circuit binding precedent, you know, at least from  
4 2002, which is well before any of these acts, that if a prison  
5 official engages in an act that causes an injury to a prisoner  
6 that has no justification penologically whatsoever, that that  
7 can give rise to an Eighth Amendment claim. And if -- if --  
8 you may disagree with my reading of the law or the way I'm  
9 presenting it, but if one were to agree with that it's 100  
10 percent clearly established and there would be no qualified  
11 immunity available to any of the individuals who engaged in  
12 this, whether they were involved at the front-end of selecting  
13 this particular drug testing system and regime when they ought  
14 to have known that it was going to cause these kinds of  
15 problems and was unreliable or the higher level officials who  
16 knew that there were problems very early on and refused to act  
17 or do anything meaningful to address it for many, many months,  
18 you know, giving rise to almost a year of this taking place.

19 THE COURT: Let me ask your adversary. Once again,  
20 Herd, the Court said this was an Eighth Amendment violation,  
21 keeping him in jail for an additional year beyond the release  
22 date. They said was an Eighth Amendment violation. How do  
23 you distinguish that from this case?

24 MS. DEDUSHI: Your Honor, that case is  
25 distinguishable because, first of all, plaintiffs have

1 conceded in their opposition papers that they're not even --  
2 they're not even challenging the conditions in which they were  
3 confined in this case. And -- again, I would say the same  
4 thing for Herd. I would say that that also was decided after  
5 these incidents took --

6 THE COURT: That deals with qualified immunity, but,  
7 you know, we can get to that separately. But get back to the  
8 basic violation. If the Second Circuit said -- I'm a preacher  
9 of the Second Circuit, okay, that keeping him a year beyond  
10 his release date satisfies the shocking of the conscience  
11 standard, satisfies the Eighth Amendment standards. And so  
12 we're not talking about depriving somebody of food or medical  
13 treatment here. You know, typically, I think with the Eighth  
14 Amendment is that type of severe type of thing. But Herd  
15 doesn't seem to have any of that at all involved. He was just  
16 kept a year beyond his release date. They don't say he was  
17 suffering, deprived of food or medical treatment, nothing like  
18 that type of thing that triggers Eighth Amendment concerns.

19 MS. DEDUSHI: Your Honor, in Herd, in that  
20 situation, we would -- I would say that's also distinguishable  
21 because in order to show an Eighth Amendment violation under  
22 1983 lawsuit, you have to show how those people were  
23 personally involved. And we would say that --

24 THE COURT: I'm sorry, you have to say what? What  
25 do you have to show?

1 MS. DEDUSHI: Defendants by Annucci and O'Gorman are  
2 not shown to have been personally involved in any  
3 Constitutional violation, including the Eighth Amendment.

4 THE COURT: That deals with the standard of personal  
5 involvement. It may well be that some were personally  
6 involved and some were not. I do think that there are a  
7 number of these folks that really are not going to be held to  
8 be still in this lawsuit because I don't think they satisfy  
9 personal involvement. There are a couple of them that I don't  
10 really see the personal connection, but that's a separate  
11 analysis.

12 MS. DEDUSHI: Your Honor, part of the Eighth  
13 Amendment element is to show that the defendants were  
14 deliberately indifferent to the harm and there's no -- the  
15 allegations in the Complaint actually show the opposite. The  
16 moment that Annucci and O'Gorman were actually informed that  
17 the Microgenics machines were, in fact, causing false positive  
18 test results, they immediately took action. They released all  
19 the individuals that had tested positive, you know, with  
20 Microgenics machines, starting with buprenorphine. They also  
21 in addition to that ordered that their disciplinary conviction  
22 with, you know, reversed and expunged. And, additionally,  
23 Your Honor, they -- once they found out that even the other  
24 drugs were affected once they started doing confirmatory  
25 testing by GCMS, they --

1 THE COURT: Weren't they deliberately indifferent to  
2 the fact that these people were still being punished or still  
3 incarcerated or whatever for a number of months? Weren't they  
4 indifferent allegedly in this pleading to their circumstances  
5 when they were sitting in lock keep or whatever for eight or  
6 nine months when they should not have been there? Weren't  
7 they indifferent to that?

8 MS. DEDUSHI: But, Your Honor, in order to succeed  
9 in an Eighth Amendment claim, you have to show knowledge. And  
10 the allegations in this Complaint show that DOCS  
11 for a long time were told, they took steps to make sure that  
12 the machines were accurately accurate, and they were told  
13 everything was fine. It's not like they sat on their hands  
14 and did nothing.

15 THE COURT: I'm a little confused. Maybe you can  
16 straighten it out. Didn't there come a point in time when  
17 there was a report by the -- I forget the name of the State  
18 official --

19 MR. BRINCKERHOFF: Inspector general.

20 THE COURT: Inspector general.

21 MS. DEDUSHI: That was in year 2022 when they  
22 actually published that.

23 THE COURT: I'll ask your adversary. Tell me, is  
24 there anything in this Complaint that alleges that they knew  
25 or should have known that these people were improperly being

1 treated and did not do anything for nine months? I think  
2 that's the way I read your allegations. Am I wrong?

3 MR. BRINCKERHOFF: Yes, and that is a fair,  
4 plausible reading of everything in the Complaint. And if you  
5 look at our brief, it tries to summarize all of it. It -- the  
6 -- the positive test results that were unreliable and ended up  
7 proving to be false started immediately when they started  
8 putting the machines in in January of 2019. They did not  
9 suspend the use of the machines until September of 2019 and  
10 they didn't finally basically get rid of all of the  
11 punishments that were being levied upon everyone until the  
12 very end of the year. And these complaints were made  
13 systematically, repeatedly throughout this period. And they  
14 only very slowly started to respond basically in the summer of  
15 2019. And then --

16 THE COURT: That is in your Complaint. How do I  
17 pronounce your name correctly?

18 MS. DEDUSHI: It's Sarande Dedushi.

19 THE COURT: Dedushi?

20 MS. DEDUSHI: That's correct, Your Honor.

21 THE COURT: So let's assume, okay, that they knew  
22 about this, there's no question about it and they knew that  
23 the drugs was a faulty drug and they knew that these people  
24 should not have been punished the way they were punished and  
25 they did nothing about it for ten months or nine months.

1 Let's assume that. Do you think that would be deliberate  
2 indifference and satisfy the Eighth Amendment?

3 MS. DEDUSHI: Under those facts that Your Honor  
4 just --

5 THE COURT: Yes, just assume those.

6 MS. DEDUSHI: That would be a stronger argument,  
7 yes, that that would have been deliberate.

8 THE COURT: Anyway, doesn't -- don't I have to  
9 construe the Complaint. It's a lengthy, lengthy Complaint in  
10 all of its inferences in the face of the 12(b)(b) motion to  
11 basically allege that?

12 MS. DEDUSHI: Your Honor, if you look at the  
13 plaintiffs' Complaint as it involves the Annucci and O'Gorman,  
14 I can even cite you the different pages where they show  
15 Annucci and O'Gorman taking action and eventually and actually  
16 summoning someone to do an investigation and look into all  
17 these complaints. In order for a government agency to come to  
18 a conclusion, they have to do an investigation. And they took  
19 all of those steps to mitigate any potential risks of harm.  
20 So I think that that's another element that --

21 THE COURT: Do you agree with that?

22 MR. BRINCKERHOFF: No. They did not have to conduct  
23 an -- as soon as they were confronted with the overwhelming  
24 complaints that were being made, these were complaints being  
25 made by elected officials, by prisoners --

1 THE COURT: Hundreds of people. Prisoners, they  
2 were telling it was falling on deaf ears. That's what they  
3 allege.

4 MR. BRINCKERHOFF: Their duty was to do what they  
5 eventually did many months later, which was immediately  
6 suspend any discipline or any use of these machines until an  
7 investigation was done. Instead, after six months they  
8 decided to actually conduct an investigation. And over the  
9 course of the next four months approximately, the results of  
10 that investigation came back and, lo and behold, they  
11 confirmed everything that we're saying in the Complaint, which  
12 is completely unreliable, and they did -- and I give them full  
13 credit for this, you know, which they deserve, they at least  
14 confronted the reality that was before them and they cancelled  
15 the contract, got rid of the machines, stopped using them and  
16 expunged all of the records of everyone.

17 THE COURT: Ultimately, they stepped up to the  
18 plate, eventually.

19 MR. BRINCKERHOFF: They did, and deserve credit for  
20 that.

21 THE COURT: Is there any effort being made to  
22 compensate these people who have been improperly treated by  
23 the State because of this drug? Is there any effort to settle  
24 this to resolve the matter?

25 MS. DEDUSHI: Your Honor, in terms of this case or

1 are you --

2 THE COURT: Well, this is the case I have. I don't  
3 know how many people you have here to deal with. But has the  
4 State made any effort to compensate? You know, I have  
5 wrongful conviction cases and, you know, I had the leading one  
6 that triggered all of these horrible people that were  
7 incarcerated for many years in Brooklyn. Twenty-six have been  
8 released so far. And they're getting large compensation.  
9 It's almost a cottage industry for some lawyers. And I had  
10 the -- I sort of was in the forefront of that, but they were  
11 compensated.

12 How about here? Why don't you compensate these  
13 people? You just want to walk away scot-free here?

14 MS. DEDUSHI: No, Your Honor. As alleged in the  
15 Complaint DOCS, the moment they found out that -- it was  
16 confirmed that the Microgenics were not reliable, as I stated  
17 earlier, the prisoners were released, the ones that were, in  
18 fact --

19 THE COURT: Is that enough here? I mean, shouldn't  
20 there be some monetary compensation? I mean, have you  
21 negotiated? Have you sat down and discussed a settlement in  
22 this case?

23 MS. DEDUSHI: No, we have not.

24 THE COURT: Is there any reason why? I'm asking  
25 you. It seems like that's the humane thing to do here.

1 MS. DEDUSHI: Your Honor, that's a process and --

2 THE COURT: It's not your department, right?

3 MS. DEDUSHI: I apologize.

4 THE COURT: Anyway, you want me to dismiss this case  
5 and these people go without any remedy at all? That's your  
6 position?

7 MS. DEDUSHI: Your Honor, this is a standard motion  
8 to dismiss. We believe the plaintiffs do not sufficiently  
9 allege --

10 THE COURT: What happens when I deny your motion to  
11 dismiss? Are you going to engage in settlement negotiations?

12 MS. DEDUSHI: That's something we can consider, but  
13 I --

14 THE COURT: Well, maybe I can appoint somebody to  
15 supervise that. Maybe we can have some supervisory role here.  
16 I'm going to deny it. You know, I just can't fathom letting  
17 the State get away with this and just say, I'm sorry, there's  
18 no recourse or there's no responsibility that we have. It  
19 doesn't square with my sense of justice.

20 So if you want to talk to the authorities and see  
21 whether I can help you, maybe put in a motion to process to  
22 resolve this case, eventually it's going to have to be  
23 resolved one way or the other.

24 What do you think of that idea?

25 MR. BRINCKERHOFF: We're always willing to spend

1 time and energy to try to resolve a case without further  
2 litigation? Magistrate Judge Scanlon has suggested this idea  
3 in the past, and at least with the corporate defendants  
4 they've been unwilling to engage in any discussions that would  
5 include relief for all of the putative class members because  
6 this is a class action. And so I think it may have to wait  
7 until the class gets certified.

8 THE COURT: Let's be practical, because you're not  
9 going to a get -- you can appeal maybe a qualified immunity  
10 issue, but otherwise you're not going to -- if I deny this  
11 motion, you're not going to otherwise be able to appeal. It's  
12 a non-final determination. You may not be able to get an  
13 appeal here unless -- you have the qualified immunity issue, I  
14 guess, that being can always been appealed. But I'm willing  
15 to help you help yourselves, because these people have not  
16 been treated properly and they deserve a remedy.

17 You would say that if you were wearing the black  
18 robes.

19 MS. DEDUSHI: But, again, Your Honor, it's -- I  
20 understand what Your Honor is saying, but --

21 THE COURT: Why don't you talk to your people. A  
22 lot of them are here at the table. A couple of these people  
23 are going to be let off. I don't think there's any personal  
24 involvement. I can get the names of those people, a few of  
25 them. And you may not like that, but, you know, I'm going to

1 give a couple of them -- I'll tell you who they are right now  
2 so you know who we're talking about.

3 Bear with me.

4 I think Venettozzi, Rodriguez and Booth, I don't  
5 think they have the necessary personal involvement here. I'm  
6 inclined to let them off, but the others will all be in the  
7 suit. So I'm going to write a decision and maybe it will come  
8 out sooner than later, but, you know, I'm not playing any  
9 games. I'm just telling you straight out what I'm going to be  
10 doing, right. I just wanted to give you the opportunity to  
11 help me conceptually sort this out.

12 But I think that since it's going to be denied, why  
13 don't you think about how you can resolve this case. I think  
14 your worthy adversary is going to be open to it. It's going  
15 to be resolved eventually.

16 MS. DEDUSHI: Your Honor, if they want to provide a  
17 settlement demand, we'll take it into advisement.

18 THE COURT: Think about it. I don't know how long  
19 it's going to take me to get a decision. I'm going to try to  
20 get it out pretty quickly. I've done a lot of work on it  
21 already, but I'm more concerned about getting litigation  
22 resolved that ought to be resolved. And, you know, why spin  
23 your wheels and have this thing protracted and, you know --  
24 when ultimately you're going to have to resolve, in all  
25 probability, one way or the other. I just can't see where

1 you're going to be successful at having this whole case  
2 tossed. I may be wrong, but it just doesn't sound --  
3 especially in light of Herd. I just don't see that happening.

4 What else do you want to say? Does anybody else  
5 want to talk?

6 You have all -- I admire your courage in taking the  
7 heat.

8 If these other folks would like to speak. Anybody  
9 else want to talk?

10 MR. DONOVAN: No, Your Honor.

11 THE COURT: I hope I haven't silenced everybody  
12 here. Both of you, by all means, you know, tell me what else  
13 we should be thinking about.

14 MR. BRINCKERHOFF: The only thing I will say is I --  
15 you've made it clear that you're intending to dismiss out the  
16 three individual defendants that you mentioned.

17 THE COURT: I think that's right.

18 MR. BRINCKERHOFF: I would just urge you to consider  
19 what you're already very focused on, I think appropriately,  
20 which is just the procedural posture of the case at the  
21 moment, which is obviously a motion to dismiss.

22 THE COURT: Yeah.

23 MR. BRINCKERHOFF: I do think that some of the  
24 decisions that are out there dismissing people based off  
25 personal involvement don't take adequate notice of the fact

1 that those three defendants that you mentioned were all  
2 responsible for discipline throughout the entire system, the  
3 DOCS system throughout the state, and also involved for the  
4 drug testing throughout the state. And so it may be that at  
5 the end of discovery, and we're not shy about dropping  
6 defendants if in the end we don't end up with the goods, but  
7 we have multiple allegations of their direct involvement  
8 statewide in all of the prisons.

9 THE COURT: Well, they administered the tests, I get  
10 that. You know, I understand that.

11 MR. BRINCKERHOFF: And collect them and are the  
12 first line of hearing the complaints, even before they moved  
13 them up the ladder.

14 THE COURT: Look, I'll reconsider it. I'm just  
15 being straight out with everybody.

16 MR. BRINCKERHOFF: I appreciate that. And I'm, of  
17 course, I'm forthrightly telling you I'd like you to change  
18 your mind, but that's okay.

19 THE COURT: Look, you have plenty in here without  
20 them.

21 MR. BRINCKERHOFF: Understood. I just think we can  
22 get rid of them later and that would be just as efficient.

23 THE COURT: You know, I am a little sensitive to the  
24 fact that people are named as defendants who marginally maybe  
25 should not be named as defendants. It may be the prerogative

1 thing for you to consider whether you may want to voluntarily  
2 let those three people out of the litigation. You have plenty  
3 of other people. And these are human beings. They have to be  
4 subjected to litigation and the accusations against them. So  
5 I'm trying to be evenhanded as best as I'm capable of doing  
6 that. Think about whether you want to voluntarily dismiss  
7 against those three.

8 MR. BRINCKERHOFF: I understand, and we'll consider  
9 that. They're going to be deposed in any event. And, so,  
10 maybe we wait until then, but I appreciate your point. I have  
11 no interest in causing more trouble than need be to get remedy  
12 for my clients.

13 THE COURT: You have got plenty here. And even if  
14 it's marginal one way for the other, you know, cut a break for  
15 these people. I mean, they're trying to live their lives,  
16 like we all are trying.

17 MR. BRINCKERHOFF: But just to be clear. All of  
18 these people will be indemnified by the State. We're not  
19 seeking to harm them in any way personally. But because of  
20 the Eleventh Amendment and other concerns, we cannot sue the  
21 State directly for this.

22 THE COURT: Anyway, I want to give you both of you  
23 things to think about. Anything else you'd like to say?

24 MS. DEDUSHI: Yes, Your Honor. I just wanted to  
25 state for the record that in Herd, even though the Court found

1 a liberty interest, they still dismissed the allegation --  
2 they still dismissed -- I believe it was the -- one of the  
3 claims against the defendant because they said that they -- I  
4 apologize, no -- sorry, strike that. I apologize.

5 THE COURT: There's an aspect of qualified immunity  
6 in Herd. I understand that.

7 MS. DEDUSHI: Yes, Your Honor. I apologize. Yes,  
8 there's qualified immunity as to Herd. I also wanted to note  
9 for the Court that similar claims have been brought in this  
10 courtroom in the Eastern District with similar allegations,  
11 and which is the case of *Moreland versus Microgenics*, and the  
12 Court found that there was -- that the Eighth Amendment was  
13 not implicated in that case.

14 And additionally, Your Honor, in Taylor versus  
15 Microgenics, which is another similar case with similar  
16 allegations in the Southern District of New York, the Court  
17 considered Herd in that case, but -- with similar allegations.  
18 The Court did say that there was a liberty instant in the  
19 substantive due process in that case. However, the Court  
20 still dismissed the substantive due process claim on the  
21 grounds that they were not personally involved, the defendants  
22 alleged --

23 THE COURT: They're not personally involved, I agree  
24 with you. I mean, that's why I'm inclined to dismiss against  
25 those three people.

1 MS. DEDUSHI: But Annucci and O'Gorman were not  
2 personally involved, Your Honor, in making the decision of the  
3 disciplinary --

4 THE COURT: The other people are personally  
5 involved. I think they really are personally involved. And  
6 so I'm satisfied -- look, it's an interesting case, but I've  
7 given you a lot of things to think about. Now, this was  
8 originally to be just before Judge Scanlon. Who was the  
9 person who decided that Judge Block should be deciding this  
10 case, which one?

11 MR. BRINCKERHOFF: I'm not sure if I would join  
12 quite the characterization, but there were new defendants that  
13 were added, actually all of the DOC employees --

14 THE COURT: And the new defendants wanted this case  
15 to be decided by Judge Block. Aren't you glad you made that  
16 decision now?

17 You have to have a sense of humor in this world,  
18 right?

19 Well, we're just going to try to lay it out, and,  
20 ultimately, maybe if you really don't want to resolve this  
21 case, which I think it ought to be, the Second Circuit, I  
22 guess, will wrestle with it, right?

23 So it was nice to see all of you in court, and we'll  
24 do the best we can to do what we're supposed to do as judges.

25 MR. BRINCKERHOFF: Thank you, Judge.

1 MS. DEDUSHI: Thank you.

2 THE COURT: Nice meeting you all.

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5 (Matter adjourned.)

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